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9 UNITED STATES DISTRICT COURT  
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 RYAN TUTTLE,	}	Case No.: 3:21-cv-03019-CRB
12 Plaintiff,		RYAN TUTTLE’S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO ATTORNEY GENERAL’S MOTION TO DISMISS
13 vs.		
14 RICHARDSON’S BAY REGIONAL		
15 AGENCY, CURTIS HAVEL,		
16 Defendants	}	Date: November 4, 2021
17		Time: 10:00 a.m.
18		Judge: Hon. Charles R. Breyer
19		Trial Date: Not Scheduled
20		Action Filed: April 26, 2021

21 Plaintiff Ryan Tuttle respectfully submits the following memorandum of points and  
22 authorities in opposition to *Attorney General’s Motion to Dismiss*.

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## **SUMMARY OF ARGUMENT**

The *Attorney General's Motion To Dismiss* ("Motion") does not make clear the context in which the Fourth Cause of Action arises, which is that Defendants Richardson's Bay Regional Agency and Curtis Havel, pursuant to California Harbors and Navigation Code <sup>1</sup> *Marine Debris* statutes §§550 and 551, seized and summarily destroyed Plaintiff's vessel. In context, the allegation of deprivation of Due Process is viable upon procedural and substantive due process grounds.

The subject Fourth Cause of Action anticipated that the Defendants, especially Harbor Master Havel, would defend upon the ground that his rights and obligations under the *Marine Debris* Scheme were not "clearly defined." See, *Saucier v. Katz* (2001) 533 U.S. 194, at 201; also see, *Pearson v. Callahan* (2009) 555 U.S. 223, 236.

Attorney General's argument that this action must first be tested upon the other causes of action before reaching the issue of constitutionality is the correct approach.

Plaintiff Tuttle respectfully requests the opportunity to amend his complaint to add issue of unconstitutionality upon vagueness grounds. See, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1216 (2018)[“The result is that §16(b) produces, just as ACCA’s residual clause did, ‘more unpredictability and arbitrariness than the Due Process Clause tolerates [citation omitted].”

## **PLEADED FACTS AND THE MARINE DEBRIS SCHEME**

The *Marine Debris* statutory scheme creates two classes of vessels. First, those that do not pose an imminent danger to navigation, the environment. The second class of vessels are

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<sup>1</sup> “Harb. & Nav.” Hereinafter.

1 those that do pose such dangers. The first class of vessels may be seized if they met specific  
2 criteria justifying posting a 10-day notice of intent. The second class of vessel has two sub-  
3 classes: (a) those posing the sort of immediate danger that the circumstances require immediate  
4 removal and demolition forthwith; or (b) those that are dangerous yet “whole” when seized.  
5 In instances of vessels seized without notice and that are whole, such are to be stored for ten  
6 days to give owners opportunity to retrieve. Under only the second class of vessel may  
7 authorities immediately demolish vessels. *Complaint For Damages and for Injunctive Relief*,  
8 ¶30; see, Harb. & Nav., §551(b). [ECF 1] <sup>2</sup> RBRA contends that the Tuttle vessel, m/v  
9 TRIDENT, was in the first class of vessels. *Complaint*, §§33, 34, 44.

12 The statutory scheme is problematical several ways.

13 (1) In neither instance of seized vessels that are stored does the scheme provide a forum or  
14 mechanism for review of Defendants’ labeling a boat as debris.

16 The scheme does nothing to require the seizing authority to provide any administrative  
17 procedure. In the instance of 10-day notice procedure, the only technically available  
18 mechanism would be to apply to a court for a restraining order. This is impossible in practice.  
19 Especially so in the context of the composition of the population who are being targeted by  
20 RBRA. They are not rich yacht owners. They are poor people. Many are living aboard these  
21 anchor-outs. They have no resources to hire lawyers to get emergency injunctions. When  
22 RBRA posts these vessels, the results are dangerous confrontations between owners and  
23 authorities because owners have no mechanism of review, only self-help. *Complaint*, ¶¶11, 44.  
24 These anchor-out people wind up in the homeless camps, “also becoming subject to ancillary

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27 <sup>2</sup> “Complaint” hereinafter.

1 harm, such as exacerbated poor physical health, legally causing even more depression than  
2 these ‘pandemic times’ cause many persons and causing the loss of priceless irreplaceable  
3 family memorabilia.” Complaint, ¶84.  
4

5 When Tuttle tried to communicate to Havel, as Havel was seizing TRIDENT, Havel  
6 had Tuttle stopped by an attending Belvedere police officer. Complaint, ¶¶44(4), 48.

7 (2) Another problem is that the *Marine Debris* scheme, applicable only to the first class of  
8 vessels, is the provision, “. . . the marine debris will be removed and disposed of within 10  
9 days if not claimed, and that the marine debris may be claimed and recovered upon the  
10 payment of the public agency’s costs” (Harb. & Nav. C., §551(a)(2).) This would seem to  
11 mean that the vessel must be stored for ten days after the taking. Yet, Havel/RBRA always  
12 destroy the boats immediately, the same day when possible. Complaint, ¶44(3)  
13

14 (3) Another and perhaps the most fundamental problem of all is the scheme’s definition of  
15 “marine debris”:  
16

17 “Marine debris” is a vessel or part of a vessel, including a derelict,  
18 wreck, hulk, or part of any ship or other watercraft or dilapidated  
19 vessel, that is **unseaworthy** and not reasonably fit or capable of  
being made fit to be used as a means of transportation by water.

20 Harb. & Nav. C., §550(b); emphasis added. This emphasis is because Havel did not know what  
21 “unseaworthy” meant, so he used and continues to use RBRA’s own extraordinarily broad  
22 definition of what criteria had to be met to qualify a vessel as “seaworthy” (See, Complaint,  
23 ¶38):  
24

25 Seaworthy: Operational thru hulls, hoses, and sea cocks; bilge  
26 pumps are operational and bilges are free of oil; no loose debris or  
27 materials on deck; hull, keel, decking, cabin and mast are  
structurally sound and vessel is free of excessive marine growth,

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1 excessive delamination or excessive dry rot that compromises the  
2 vessel's integrity to stay intact and afloat without extraordinary  
3 measures; capable of operation to avoid striking vessels, persons,  
4 or property should it break free from its anchor. [Ord. 19-1]

5 [ECF 1] Complaint, at pp. 56-57. This definition is a far cry from the scope and purpose of the  
6 statutory scheme as shown through its legislative history, which is.

7 COMMENT

8 1. Stated need for the bill

9 According to the author:

10 The purpose of this bill is to allow for an expedited removal process  
11 for **derelicts, wrecks, hulks and parts of ships that are no longer**  
12 **truly vessels that litter and pollute our state** waterways, beaches and  
13 tide , and submerged land.

14 This proposal draws the distinction between a seaworthy vessel and  
15 a vessel or parts of a **vessel that are unseaworthy, i.e., one longer**  
16 **capable of performing its purpose or function, and defines it as**  
17 **marine debris.**

18 2015 Legis. Bill Hist. CA A.B. 1323; emphasis added.

19 That Defendants, in their Operation Clean Sweep, use the *Marine Debris*  
20 scheme to rid Richardson's Bay of unsightly vessels is an outrageous example  
21 deprivation of substantive due process. Complaint, ¶82.

22 So-called "substantive due process" prevents the government from  
23 engaging in conduct that "shocks the conscience," *Rochin v. California*,  
24 342 U.S. 165, 172 (1952), or interferes with rights "implicit in the  
25 concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325-326  
26 (1937).

27 *United States v. Salerno*, 481 U.S. 739, 746 (1987). That there is no practical  
28 means for these anchor-outs, including Tuttle, to get any sort of constitutionally  
meaningful review is deprivation procedural due process.

When government action depriving a person of life, liberty, or property

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1 survives substantive due process scrutiny, it must still be implemented in  
2 a fair manner. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). This  
3 requirement has traditionally been referred to as "procedural" due  
4 process.

5 *Ibid.*

6 Whether any procedural protections are due **depends on the extent to**  
7 **which an individual will be "condemned to suffer grievous loss."**  
8 *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168  
9 (1951) (Frankfurter, J., concurring), quoted in *Goldberg v. Kelly*, 397  
10 U.S. 254, 263 (1970). The question is not merely the "weight" of the  
11 individual's interest, but **whether the nature of the interest is one**  
12 **within the contemplation of the "liberty or property" language of**  
13 **the Fourteenth Amendment.** *Fuentes v. Shevin*, 407 U.S. 67 (1972).  
14 Once it is determined that due process applies, the question remains  
15 what process is due.

16 *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); emphasis added. Attorney General  
17 has not explained what reasonably available due process exists on the primary  
18 issue: whether or not the vessel is marine debris? The ultimate thrust of Attorney  
19 General's argument is: "Hey, we don't care if your vessel is truly marine debris or  
20 not. We gave you enough time to move your garbage, so it's on you."

21 **This Court consistently has held that some form of hearing is**  
22 **required before an individual is finally deprived of a property**  
23 **interest.** *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974). See, e.g.,  
24 *Phillips v. Commissioner*, 283 U.S. 589, 596-597 (1931). See also *Dent*  
25 *v. West Virginia*, 129 U.S. 114, 124-125 (1889). The "right to be heard  
26 before being condemned to suffer grievous loss of any kind, even though  
27 it may not involve the stigma and hardships of a criminal conviction, is a  
28 principle basic to our society." *Joint Anti-Fascist Comm. v. McGrath*,  
341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). The  
29 **fundamental requirement of due process is the opportunity to be**  
30 **heard "at a meaningful time and in a meaningful manner."**  
31 *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). See *Grannis v. Ordean*,  
234 U.S. 385, 394 (1914).

32 *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); emphasis added.



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**LEAVE TO AMEND**

Typically, the request for leave to amend in the face of a F.R.Civ.P. 12 motion is to be freely given. See, *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011). Plaintiff Tuttle respectfully requests the opportunity to amend his complaint to add issue of unconstitutionality upon vagueness grounds. See, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1216 (2018).

The Subject Fourth Cause of action anticipated Defendants' affirmative defenses, especially Havel's qualified immunity defense.

As an alternate pleading, were Defendants to contend that Harb. & Nav. Code, §§550; et seq. do not require a post-seizure holding period, then the statutory scheme deprives Mr. Tuttle of procedural due process in that the statutory scheme denies him the opportunity to a hearing on the issue of whether or not m/v TRIDENT was marine debris.

Complaint, ¶79. See, *Defendant Richardson's Bay Regional Agency and Curtis Havel's* [sic] *Answer to Complaint* [ECF 21] affirmative defenses number 6 (*Id.*, at 10:8-12) and number 11 (*Id.*, at 10:27-11:6) Upon further examination, Tuttle believes that Havel's qualified immunity defense will raise questions of the clarity of the statutory text, thereby opening the issue of vagueness. Havel may argue that he could not reasonably understand the text so as to be deprived of immunity. "Reasonably understand" is a hallmark of an "unconstitutionally vague" issue. See, *United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 32-33 (1963).

**STANDARDS OF DECISION**

The Honorable Court must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party. [Citation omitted]."

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1 (*Taylor v. Yee*, 780 F.3d 928, 935. (9th Cir. 2015) The challenged pleading in the Complaint  
2 must be assessed as whole, and not disjunctively, losing track of facts incorporated when  
3 addressing a specific cause of action. "The court's job is not to scrutinize each allegation in  
4 isolation but to assess all the allegations holistically." *Tellabs, Inc. v. Makor Issues & Rights,*  
5 *Ltd.*, 551 U.S. 308, 326 (2007).

7 [C]ourts must consider the complaint in its entirety, as well as other  
8 sources courts ordinarily examine when ruling on Rule 12(b)(6) motions  
9 to dismiss, in particular, documents incorporated into the complaint by  
10 reference, and matters of which a court may take judicial notice. See 5B  
11 Wright & Miller§ 1357 (3d ed. 2004 and Supp. 2007). The inquiry, as  
12 several Courts of Appeals have recognized, is whether all of the facts  
13 alleged, taken collectively, give rise to a strong inference of scienter, not  
14 whether any individual allegation, scrutinized in isolation, meets that  
15 standard. See, e.g., *Abrams v. Baker Hughes Inc.*, 292 F.3d 424,431  
16 (CA5 2002); *Gompper v. VISX, Inc.*, 298 F.3d 893, 897 (CA9 2002).

14 *Id.*, at 322-323. Attorney General's motion to dismiss action for failure to state  
15 claim may be granted only if it appears beyond doubt that Tuttle can prove no set of facts in  
16 support of their claim under 42 U.S.C., § 1983 which would entitle them to relief. *Calhoun v.*  
17 *United States*, 475 F. Supp. 1 (S.D. Cal. 1977), *affd*, 604 F.2d 647 (9th Cir. 1979).

19 RESPECTFULLY SUBMITTED,

20 Dated October 8, 2021

20 BERSCHLER ASSOCIATES, PC

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24 ARNOLD I. BERSCHLER attorney for  
25 RYAN TUTTLE

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